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Supreme Court, U. S.
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No. .....

In The Supreme Court of The United States

OCTOBER TERM, 1971

CLIFFORD J. BROWN,
JUAN G. LOPEZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT TO REVIEW THE JUDGMENT OF THAT COURT ENTERED MARCH 31, 1972 IN

UNITED STATES OF AMERICA,
Appellee,

v.

CLIFFORD J. BROWN,
Defendant, Appellant No. 71-1373

UNITED STATES OF AMERICA,
Appellee,

v.

JUAN G. LOPEZ,
Defendant, Appellant No. 71-1374

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UNITED STATES OF AMERICA,
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Clifford J. Brown and Juan G. Lopez petition the Supreme Court of the United States to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered on March 31, 1972, not as yet reported, copy attached, affirming judgments entered on verdicts of guilty in a criminal prosecution.

OPINION BELOW

The judgment of the Court of Appeals for which review is sought was entered on March 31, 1972. On April 20 ,1972, the Court of Appeals entered an order to stay its mandate until May 9, 1972. Copy of the opinion, which is not yet reported, is attached.

JURISDICTION

Jurisdiction of this Court to issue this writ to review the judgment of the Court of Appeals is provided by U.S. Code Title 28, Sect. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court was in error in denying the motion of the co-defendant and alleged co-conspirator Juan G. Lopez to suppress certain evidence consisting of items which were part of the effectuation of the conspiracy alleged and which, in the view of Lopez, were the fruit of an unlawful search of his premises and an unlawful seizure of articles therefrom.

2. Whether the right of the defendant and co-conspirator Clifford J. Brown to be free from the effects of an unlawful search and seizure was violated by the evidentiary use of items connected with the conspiracy alleged as to himself and Lopez which were the subject and fruit of an unlawful search of the premises of Lopez.

3. Whether the rights of Lopez not to incriminate himself and to have counsel for his defense were violated by the

use of incriminating statements made to one State Police Sergeant O'Neil in the yard after Lopez had attempted without success to reach his attorney by phone.

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

Amendments—

IV. The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury . . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . .

VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

In a XIII count indictment Brown was charged in Count I with conspiring with Lopez and another to receive, conceal, and sell stolen motor vehicles which were moving in interstate commerce, knowing same to have been stolen, in Counts II and IV, with receiving and disposing of a stolen motor vehicle moving interstate, in Count III, with engaging in the same act jointly with Lopez. Lopez was additionally charged

in nine counts with reception and sale of interstate moving motor vehicles knowing same to have been stolen. 18 U.S.C. §§ 371 and 2313. The date alleged in Count I was "in 1969", in Counts II, III, and IV, June 1969, and in the remaining nine counts, September 1969. The alleged place was Norton, Massachusetts.

The scene commences on the morning of September 24, 1969. Local police officers received information, as a result of which, they drove and walked into a section of woods which, as it happened, was a quarter of a mile from the rear of Lopez' property and south thereof. In this area the police officers found three late-model cars, two verified shortly thereafter as stolen from New York City, and the third similarly identified in the afternoon.

A party of two local policemen and two state troopers, Sergeant O'Neil and Trooper Anderson, went to the Lopez property around 2:30 in the afternoon. When Lopez approached them, they identified themselves as police officers, referred to the cars, and asked him if he would mind accompanying them down the path to look at the cars. Lopez agreed. The path was blocked at one point with branches and boughs of trees more or less piled up and blocking the end of the road (App. 2-112). Lopez said that he had placed the branches there to keep people out (App. 2-35). The debris was pushed aside. When they reached the cars, Lopez said that he knew nothing of them; and he was thoroughly shocked.

The group then returned to the Lopez yard. Norton Police Officer Brugliera testified that at this point he advised him (Lopez) of his legal rights under the *Miranda* decision—

that he could remain silent, that anything he said could be used against him in a court of law, that he had the right to have an attorney present during an interrogation, and that an attorney would be provided if he could not afford one. Lopez said that he understood those rights (App. 2-36). Lopez said he wanted to make some phone calls, and the officers said that he could. Lopez walked into the house accompanied by the officer. After making four or five phone calls, Lopez went with his wife into another room, closed the door, and after 15 or 20 minutes came out. Lopez said to the police officer that he knew about the cars and that he wanted to talk to Sergeant O'Neil.

Lopez' affidavit in support of his motion to suppress statements and physical objects (p. App. 13) sets forth that, when he made the afternoon phone calls, Officer Brugliera was *at his side*. His lawyer being out at that time, he had called a friend to contact his lawyer.

Officer Brugliera conceded that at that time he knew that Lopez wanted to make a call to his attorney (p. App. 24). After Lopez had made numerous unsuccessful calls to his attorney, Officer Brugliera still "talked to him" (p. App. 24).

Outside the house the officer called Sergeant O'Neil and stated to O'Neil that Lopez wanted to talk about the cars (App. 2-39), and that Lopez had been advised of his *Miranda* rights (App. 2-113). Lopez claimed in substance that he had met a man in a cafe in a nearby city, that he had purchased the three cars from that man, paying $100 apiece. Lopez was then placed under arrest and taken to the local police station.

A wrecker responded that evening to a call from the police group to haul out the three cars referred to above. Bushes and branches were removed from the path to provide access to the wooded area at the rear of Lopez' property. Removing the brush, State Trooper Anderson observed a partially stripped Ford automobile behind a shed on Lopez' property. When he approached it, he discovered automobile parts strewn about the area behind the shed, a homemade rig for removing automobile engines, and the chassis of another stripped vehicle. This happened at about 8:00 p.m. A search of the rubble and nearby ash can led to the discovery of VIN plates which formed the basis of several substantive counts.

All the above was introduced into evidence despite a motion to suppress which was made generally by the one attorney who represented both Brown and Lopez (App. 2-116).

In the morning, when the police officers had first located and viewed the three "late model" cars, access to the wooded area had been obtained not from Lopez' property, but from a road running along a power line, which road met the car path which was then used to get to the cars (App. 2-8; 2-9, Exhibit 8, a map).

REASONS FOR GRANTING THE WRIT

1. When Lopez was placed under arrest and taken to jail, the circumstances had progressed to such a point that any further examination of the premises by the police would amount to a new investigation which would require that a warrant be issued, if it could be issued, after a probable cause hearing. Lopez' status was that of a person who had admitted buying three "late model" cars

identified *by the officers* as stolen, from a stranger at a bar for $100 apiece. The cars were not on his property. Rather they were in a wooded area behind his property. The court below assumed a *license* in the police to use the car path to lead the wrecker to the stolen cars. This is an assumption not supported by the record. Lopez was gone, and he had not given such a license. A license could not be implied because the original access used in the morning was available to the police.

The actions of Trooper Anderson in clearing the path of brush and boughs thereby exposing the partially stripped Ford automobile were therefore illegal. Because he had no right to use the car path, Trooper Anderson had no right to be in such a position that he could view the partially stripped Ford. The situation was essentially the same as it would have been if he had walked onto the property and then had decided to search it. All objects then and subsequently found were the products of a search without a warrant, a violation of constitutional rights guaranteed by the Fourth Amendment. *Vale* v. *Louisiana,* 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d. 409 (1970).

The error of the court below in failing to suppress the items of evidence beginning with the partially stripped Ford was error also as to the defendant Brown. The government's case included a charge of conspiracy to receive, conceal, and sell stolen motor vehicles. An agreement by two persons to receive and sell motor vehicles must include equal rights to have access to and possession of the vehicles. The impermissible seizure of vehicles and other items, to which Brown had as much right as Lopez, if he had any connection at all with them, was a violation of Brown's Fourth Amendment

right to be secure in his "effects" against "unreasonable searches and seizures."

II. There was error in the court's failure to suppress the evidence of statements made by Lopez in the yard of his house.

When Lopez went into his house to make phone calls, Officer Brugliera went with him and was at his side. Officer Brugliera knew at that time that Lopez wanted to talk with his attorney (App. 24). The officer's presence had two effects. First, he could make sure that his "suspect" did not run away or destroy possible evidence. Second, his presence at his side clearly amounted to a form of oppression of freedom of thought. The officer's overbearing presence served as a message that "the police have you", and that "you cannot get away". After Lopez had made unsuccessful calls to the attorney, Brugliera reported that "we talked to him", referring presumably to Sergeant O'Neil and himself (App. 25). "I talked to him", said Brugliera (p. 25). Sergeant O'Neil also questioned him (App. 25), for a few short minutes in the yard (App. 26). Such a record shows that within the rules laid down in *Miranda* v. *Arizona*, 384 U.S. 436, 444, 445, 473, 474, 475, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and applied in *United States* v. *Priest*, 409 F.2d 491, 493 (5th Cir. 1969), the right of Lopez not to incriminate himself and his right to have the assistance of counsel for his defense was substantially impaired to a degree that cannot be tolerated. A policeman was at his side in the house. In the yard he was in effect surrounded by uniformed police, an experience that would likely produce no mean psychological effect on him. Assistance of an attorney had been requested to the knowledge of

the police. When this request had been made, the officers should have awaited the arrival of the attorney before engaging in further questioning, and, furthermore, they should not have listened to Lopez. If this rule is not upheld, then the ignorant, those most susceptible to unspoken but very real pressures, the lowly, all those most in need of the protection of these constitutional guarantees, will find all too often that the have no protection at all.

CONCLUSION

For the above reasons defendants Brown and Lopez respectfully submit that this Court should issue a writ of certiorari to review the judgment of the Court of Appeals.

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 71-1373

UNITED STATES OF AMERICA,

APPELLEE,

v.

CLIFFORD J. BROWN,

DEFENDANT, APPELLANT.

No. 71-1374

UNITED STATES OF AMERICA,

APPELLEE,

v.

JUAN GUZMAN LOPEZ,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Charlotte Anne Perretta, with whom *Joseph S. Oteri, Crane, Inker & Oteri*, and *Edward J. Kelley* were on brief, for appellants.

Henry H. Hammond, Assistant United States Attorney, with whom *Joseph L. Tauro*, United States Attorney, was on brief, for appellee.

March 31, 1972

McENTEE, *Circuit Judge*. Defendants Brown and Lopez were convicted of conspiring to receive, conceal, sell, and dispose of motor vehicles moving in interstate commerce, knowing them to be stolen and of receiving, concealing, sell-

ing, and disposing of twelve stolen motor vehicles.[1] They appeal contending that the district court should have suppressed certain physical evidence and statements made by Lopez. Brown's appeal is totally dependent on the favorable resolution of the issues raised by Lopez. Since we resolve these issues adversely to Lopez, we address ourselves only to the facts underlying his conviction.

On the morning of September 24, 1969, the police in Norton, Massachusetts were informed that a late model automobile with no registration plates had been seen in the middle of the woods in the southeast section of Norton. They investigated, found the vehicle in question, and discovered two other late model vehicles nearby. Upon learning that two of the three vehicles had been stolen in New York, they requested assistance from the Massachusetts State Police. About 1:30 that afternoon State Police Sergeant O'Neil and Trooper Anderson arrived in Norton, and together with Officers Brugliera and Clark of the Norton Police proceeded to the place where the three cars were located. There they ascertained that the third vehicle was also stolen. These cars were within three hundred yards of each other and each was adjacent to a cart path through the woods. The only access to this path was across property occupied by Lopez which was situated approximately a quarter of a mile to the north.

About 3:30 that afternoon the four officers drove onto Lopez's property where he and another man were working on an automobile. Lopez approached the officers, who identified themselves and told him about the three cars in the woods. The four officers and Lopez then walked down the

[1] Violations of 18 U.S.C. §§ 2313 and 371 (1970). Defendants Brown and Lopez, together with one Joe Guzman, were charged with conspiracy in Count I. Guzman's trial was severed. Brown was charged with receipt of three vehicles, Counts II, III, and IV. Lopez was charged with receipt of ten vehicles, Counts III, V, VI, VII, VIII, IX, X, XI, XII, and XIII.

path to view the vehicles and returned to the yard. During this walk Lopez admitted that he controlled access to the path and stated that he had placed two piles of brush across it to prevent its unauthorized use. He denied, however, knowing anything about the cars in the woods. On returning to the yard, the officers, observing that the defendant had become increasingly nervous, told him that he was under suspicion and informed him of his rights. Lopez then requested and was granted permission to make some telephone calls. After several unsuccessful attempts to reach his attorney, and after a private conversation with his wife, he told Officer Brugliera that he knew about the cars and wanted to talk to Sergeant O'Neil. He told O'Neil that he had bought the cars from a man in a bar for $100 each and that he still owed this individual $100 for the third vehicle. He professed to be unable to tell the police either the man's name or where he could be reached. Lopez was then placed under arrest and taken to the Norton Police Station. Later that evening he was questioned in the presence of his attorney and repeated essentially the same story in more detail.

Sometime after Lopez's arrest, a tow truck summoned by the police arrived at his house to remove the three vehicles from the woods. In the process of removing brush that was blocking the cart path, Trooper Anderson observed a partially stripped Ford behind a shed on the Lopez property. When he approached it, he saw automobile parts strewn about the area behind the shed, a homemade rig for removing automobile engines and the chassis of another stripped vehicle. This occurred at about 8 p.m. There were also New York license plates lying on the ground and evidence that an attempt had been made to destroy the identity of the stripped vehicles by removing and burning vehicle identification number (VIN) plates and other components. The police searched the piles of rubble and the nearby ash can

and discovered VIN plates which formed the basis of several of the substantive counts.

Lopez contends that the automobiles, license plates and VIN plates discovered by the officers after his arrest were the fruits of an illegal search. Initially, he argues that since the officers had no more evidence when they arrested him than they had when they first went on his property, if the arrest was proper then they must have had probable cause for their initial entry and should have obtained a warrant. This argument is without merit because, if the officers had probable cause for an arrest they needed no warrant to peaceably enter the property to effect an arrest. Moreover, even in the absence of probable cause the police were entitled to pursue their investigation and to go upon the land to question him. *See Ellison* v. *United States*, 206 F.2d 476 (D.C. Cir. 1953). The above argument is also unsupported by the record since it was not until Lopez admitted that he controlled the cart path, appeared nervous, and made contradictory statements regarding the vehicles in the woods that the officers had probable cause to arrest him.

Lopez further argues that the partially stripped Ford discovered by Trooper Anderson in the process of clearing the path was not in plain view. However, the testimony establishes that the vehicle was clearly visible once the brush had been removed, so the only question here is whether the officer was properly in a position to view it. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465 (1971). We hold that he was. The police had a duty to remove and secure the three stolen vehicles found in the woods, and to accomplish this they had a license to enter upon the property and, if necessary, move the piles of brush hindering the removal operation. They were not required to go about this task with their eyes closed. *See Harris* v. *United States*, 390 U.S. 234 (1968); *Fagundes* v. *United States*, 340 F.2d 673 (1st Cir. 1965). That

Lopez had already been arrested for receiving these vehicles is not significant. Moreover, since Trooper Anderson had reasonable grounds to suspect that the partially stripped Ford might be a stolen vehicle, he did not violate Lopez's fourth amendment rights in approaching the vehicle for the limited purpose of ascertaining its identity. *See Dadurian v. United States*, 450 F.2d 22 (1st Cir. 1971).

The validity of the subsequent search of the vicinity of the shed and of the stripped cars as a result of which various VIN plates and New York license plates were discovered rests on a different rationale. The testimony renders untenable any assertion that all the items were in plain view, and we assume without deciding that they were not abandoned.[2] However, the exigent circumstances of this particular case justify the police in proceeding without a search warrant. The discovery of the two partially stripped vehicles, the rig for removing automobile engines, the various vehicle components strewn about and the obvious attempt to render the vehicles impossible to identify, cast new light on the situation. This evidence gives rise to the likelihood that the police were dealing with more than a single receiver of stolen automobiles. Since it was already evening and since only Lopez was in custody, there was substantial danger that evidence pertaining to other vehicles might be removed or destroyed during the night. Under these circumstances the police were justified in extending the search.

Lopez also contends that statements made by him subsequent to being told that he was under suspicion and prior

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[2] The record is obscure concerning which items were found in the rubbish piles and ash barrel and which were found elsewhere. We are, therefore, reluctant to address ourselves to the difficult issues of whether this evidence had been abandoned or whether it was within the "curtilage" protected by the fourth amendment. *See Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966), and *compare Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957); *People v. Edwards*, 71 Cal.2d 1096, 458 P.2d 713 (1969); *with United States v. Minker*, 191 F.Supp. 683 (E.D.Pa. 1961), *aff'd*, 312 F.2d 632 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963); *See also Katz v. United States*, 389 U.S. 347 (1967); *Hester v. United States*, 265 U.S. 57 (1924).

to the arrival of his attorney at the police station should have been suppressed. He was informed of his constitutional rights on several occasions: (1) when he was told he was under suspicion; (2) when he was placed under arrest; and (3) when he was taken to the Norton Police Station. He expressed no unwillingness to answer questions, and in fact, after a private conversation with his wife, volunteered to make his original statement about purchasing the stolen vehicles. This statement was not the result of police interrogation, nor was he in custody at the time it was made. Therefore, we cannot accept Lopez's assertion that his unsuccessful attempt to reach his attorney indicated a desire to remain silent, nor do we believe that the police should have construed it as such. *Cf. United States* v. *Priest*, 409 F2d. 491 (5th Cir. 1969); *United States* v. *Nielsen*, 392 F.2d 849 (7th Cir. 1968). The record indicates that the government has sustained its burden of showing that Lopez's statements were voluntarily made. *See Lego* v. *Twomey*, — U.S. —, 40 U.S.L.W. 4135 (Jan. 12, 1972).

In view of the above and since Brown's only contention is that evidence improperly admitted against Lopez was also improperly admitted against him, the judgment of the district court is affirmed.